

Volume No.: 1 February, 2013

ISSN 2320 -2696

# *Fiat Justitia*

*let justice be done....*



*Deccan Education Society's*  
**Navalmal Firodia Law College, Pune**

---

## ROLE OF LAWYERS FOR SPEEDIER CRIMINAL JUSTICE SYSTEM

---

~ Prof. (Dr.) Mukund Sarda\*

1. India has a democratic system of governance, which is rooted firmly in the doctrine of 'Rule of law'. Rule of law postulates that the Country is essentially consists of 'the government of laws and not of men. It is the laws that rule and not men'.<sup>1</sup> The concept of 'rule of law' was enshrined in *Dharma Sastras* in the ancient society. In a democratic society, people undoubtedly possess the right to life and personal liberty as a part of Constitutional guarantee (see Art. 21 of the Constitution).<sup>2</sup> Art. 22 of the Constitution of India provides (a) An accused person is entitled to be informed of the grounds of his arrest, (b) right to be produced before the nearest magistrate within (24) hours of his arrest and (c) right to consult and be defended by a legal practitioner of his choice. However, these safeguards are not available for a person detained under a law relating to preventive Detention.<sup>3</sup>
2. When a person is arrested for a violation of a law in force, many issues relating to his detention, bail and subsequent prosecution before a criminal court for trial to take place in accordance with procedures laid down.<sup>4</sup> *Menaka Gandhi*,<sup>5</sup> *Mohd Hussain*<sup>6</sup> and several other decisions of the Supreme Court held that a right to speedier and fair trial of a person accused of a crime are integral part of Art 21 of the Constitution, though not mentioned specifically in the Constitution. It is now through a series of decisions, which under Art 141<sup>7</sup> is 'law' binding on all authorities

---

\* Principal & Dean, Faculty of Law, Bharati Vidyapeeth, New Law College, Pune.

This paper is presented at the Golden Jubilee Celebrations of the Bar Council of India held at Vigyan Bhavan, New Delhi on 16<sup>th</sup> & 17<sup>th</sup> Feb, 2013.

<sup>1</sup> This is almost similar to US Supreme Court ruling in *Steel Seizure case* which states: 'The essence of free Govt. is to live to leave by no man's leave, underneath the protection of law. It shall be the Govt. of laws and not of men'.

<sup>2</sup> Art 21 of the Constitution provides thus: 'No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law'.

<sup>3</sup> Constitutional safeguards are provided under Art 22 (2) to 22(7) of the Constitution which are the minimum safeguards, though the law relating to Preventive Detention itself has been viewed as opposed to a democratic society.

<sup>4</sup> See for details the procedures prescribed by the code of criminal procedure.

<sup>5</sup> *Menaka Gandhi v. Union of India*, AIR 1978 SC P.597.

<sup>6</sup> *Mohd Hussain v. State (Govt. of NCT) Delhi*, 2012 Cr LJ SC P.4537.

<sup>7</sup> Art 141 provides that the law declared by the Supreme Court shall be binding on all courts with in the territory of India.



under 144,<sup>8</sup> the right to Speedier Justice has now become a part of Art 21 through the interpretative power of the Supreme Court. It is now the right time to amend Art 21, to Constitutionally incorporate a provision that all accused persons have a right to 'speedier and fair trial'.<sup>9</sup>

3. One of the essential ingredient of a speedier trial is that the trial shall be held expeditiously, avoiding delay. 'Fair' trial is another ingredient, as unfair trials are unreasonable or unfair procedures contrary to the principles of natural justice will vitiate the trial necessitating a retrial of the cases, where it has resulted in 'failure of justice' which would considerably delay in the justice delivery system. Delay in the justice delivery system exposes an accused person to the following consequences:<sup>10</sup>
  - (i) He is subjected to unnecessary or unduly long detention in custody;
  - (ii) He is subjected to worry, anxiety, expense and disturbance of his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial;
  - (iii) He is subjected to impairment of the ability to defend himself whether on account of death, disappearance or non-availability of witnesses or otherwise; and
  - (iv) He cannot be denied the right to speedier justice on the ground he had failed to demand a speedy trial.
4. The main reason for delay in the Criminal Justice System can be stated thus:-
  - (i) The nature and circumstances of the case;
  - (ii) The prosecuting agency in the conduct of the case;
  - (iii) The tactics of the defence; and
  - (iv) The general situation prevailing in the Country.

Procedures in the trial do not reasonably ensure quick trial and can be regarded as 'unfair', 'unjust' or 'unreasonable'. The guiding factor,

---

<sup>8</sup> Art 144 provides that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

<sup>9</sup> Art 21 may be amended to incorporate this right.

<sup>10</sup> This was lucidly pointed by Dr. J. N. Pandey, The Constitutional Law of India, 49<sup>th</sup> Edition 2012, P.274-275.

'demand of justice' being not adhered to or ignored, thus many other factors which contribute to delay in the disposal of the case creeps into the system and results in prolonged delay. The Bar and the Bench, as members of a judicial family and as parents of 'justice' should actively co-operate and committed to the cause of justice and quick disposal of cases. It is a part of the Bar which acts as a functionary-prosecuting agency which has a greater role to play in the quick and expeditious disposal of the case. It should refrain from any acts, which are contrary to principles of justice and truth like *Zahira Habibullah H. Shaikh's case*<sup>11</sup> where the entire prosecuting agency was trying to shield the accused. Best Bakery case considered as an extra-ordinary case, where the trial was farce, witnesses were terrified and intimidated, to keep them away from the court and a retrial was ordered with a direction to appoint a new prosecutor with the consent of the victim and the trial to take place outside the State of Gujarat. Cases such as these are a sad reflection in the history of criminal justice system causing untold misery and suffering to the party affected thereby. Such cases are the best illustrations of law being used for inflicting sufferings instead of serving the process of justice dispensation. In *State of M.P. v. Bhooraj*<sup>12</sup>, the Supreme Court held as follows:-

- (i) 'De novo' trial should be the last resort and that too only when a course becomes so desperately inevitable;
- (ii) It should be limited to the extreme exigency to avert a 'failure of justice';<sup>13</sup>
- (iii) Any omission or even the illegality of the procedure which does not affect the Core of the case is not a ground for ordering re-trial; and
- (iv) 'De novo' cases result in repeating the whole exercise and results in waste of time, energy and costs and should not be ordered unless there is 'miscarriage of justice'.

The cumulative effort of Sec 461,<sup>14</sup> 462<sup>15</sup> and 465(1) of<sup>16</sup> the Criminal Procedure Code makes it obligatory on the part of superior courts

---

<sup>11</sup> *Zahira Habibullah H. Shaikh & others v. State of Gujarat & others*, AIR 2004, SC P.3114, hereinafter referred to as 'Best Bakery Case'.

<sup>12</sup> AIR 2001 SC P.3372.

<sup>13</sup> 'Failure of justice' appears as an etymological Chameleon 'as per Lord Diplock in *Town Investments Ltd. v. Dept. of Environment*.'

<sup>14</sup> Sec 461 deals with irregularities which vitiate the proceedings.

<sup>15</sup> Sec 462 proceedings in a wrong place will not vitiate the proceedings unless results in 'failure of justice'.



not to quash the proceedings merely on the ground of such error, omission or irregularity unless such elements resulted in 'failure of justice'. A clear examination of the case by the courts is an inevitable necessity to ascertain whether there was really a 'failure of justice' or whether it is only a 'Camouflage'<sup>17</sup>

5. The question of Bar of limitation and fixing a time-limit for the disposal of the case have arisen on several occasions. The Supreme Court in *A. R. Antulay's case*<sup>18</sup> held as follows:-
- (i) Bars of limitation are uncalled for and impermissible;
  - (ii) They tantamount to impermissible legislation - an activity beyond the power which the constitution confers on the judiciary;
  - (iii) They fly in the face of law and run counter to the doctrine of precedents and their binding efficacy;
  - (iv) It is neither advisable nor feasible, nor judicially permissible to draw and prescribe an outer-limit for conclusion of all criminal proceedings;
  - (v) The applicability of the ratio in *Antulay's case* would depend on the fact situation of each case and it is difficult to foresee all situations and no generalisation can be made.

It is a well-considered judicious statement that a watchful and diligent judge can prove to be a better protection of the right to speedy trial of an accused than any guideline. Sec 309,<sup>19</sup> 311<sup>20</sup> and 258<sup>21</sup> of the Criminal Procedure Code can be advantageously invoked to ensure the right to speedy trial. Lawyers can profitably invoke the inherent jurisdiction of the High Courts<sup>22</sup> also the writ jurisdiction to get appropriate reliefs or directions for the expeditions and speedier justice.<sup>23</sup>

6. The principle of fair trial is closely linked with speedier justice and one is dependent on the other. The violation of the principle of

<sup>16</sup> Sec 465(1) Cr Pc provides no finding, sentence or order, passed by the court shall be reversed unless there is a 'failure of justice'.

<sup>17</sup> *Shamem Saheb M. Multtani v. state of Karnataka*, AIR 2001 SC P.931.

<sup>18</sup> AIR 1992 SC P.1701.

<sup>19</sup> Sec 309 deals with the powers of the court to postpone or adjourn proceedings.

<sup>20</sup> Sec 311 deals with the powers of the court to summon material witness or examine any person present in the Court.

<sup>21</sup> Sec 258 deals with the powers of the court to stop proceedings in certain cases.

<sup>22</sup> See Sec 482 Cr PC.

<sup>23</sup> See for details Art 226 of the Constitution of India.

fair trial results in violation of the principle of speedier justice, as it is bound to result in the delay of the cases either the case being remanded for re-hearing or in extreme cases ordering 'de novo' trial. The following violation of the principles of fair play can be stated thus:-

- (i) Not providing legal aid to the accused, and the accused not being represented by a lawyer, which results in proceedings being vitiated;<sup>24</sup>
- (ii) Long delay of (7) years after the alleged incident, fresh trial ordered. It was held to result in harassment and abuse of judicial process. The High Court, in the exercise of inherent powers under Sec 482 Cr P.c ordered the dropping of proceedings<sup>25</sup>;
- (iii) Though no time-limit can be fixed for the disposal of a case, the courts can order that the proceedings shall be commenced without delay and shall be disposed of as expeditiously as possible;<sup>26</sup>
- (iv) The provisions of Criminal Procedure Code (already referred to)<sup>27</sup> are consistent with the guarantee of speedy trial emanating from Art 21 of the Constitution;<sup>28</sup>
- (v) In an acquittal appeal case of more than 18 years from the date of incident and 15 years from the date of acquittal, the Supreme Court maintained the order of acquittal,<sup>29</sup> though lapse of several years since the commencement of prosecution was held as not a ground to discontinue the prosecution and there is no violation of the right to speedy justice;<sup>30</sup>
- (vi) Pendency of cases for long duration needs to be balanced with regard to the impact of crime on society and the fact situation; and

---

<sup>24</sup> *Tyron Nazarat v. State of Goa* (1994) Suppl (3) SCC P.321. See also, *Khatri v. State of Bihar*, AIR 1981 SC P.928 and *Sukh Das v. Union Territory of Arunachal Pradesh*, AIR 1986 SC P.991.

<sup>25</sup> *S. Guin & others v. Grindlay's Bank Ltd.*, AIR 1986 SC P.289.

<sup>26</sup> *Gopi Chand v. Delhi Administration*, AIR 1959 SC P.609.

<sup>27</sup> See Note 19, 20, 21 & 22.

<sup>28</sup> *A. R. Atulay & Others v. R. S. Nayak*, AIR 1992 SC P.1701. See also, *Hussainara Khatoon & others v. Home Secretary, Bihar*, AIR 1979 SC P.1360 and *Raghvir Singh v. State of Bihar*, AIR 1987 SC P.149.

<sup>29</sup> *State of Punjab v. Ajaib Singh* AIR 1995 SC P.975.

<sup>30</sup> *Phoolan Devi v. State of MP* (1996) 11 SCC P.19.



- (vii) Constant, ongoing development process continually adopted to new changing circumstances and exigencies of the situation – peculiar at times and related to the nature of the crime, person involved, directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.<sup>31</sup> Thus, there is a need to balance the interests of the accused, victims and society.
- 7. The concept of speedier justice has to comply with the principles of natural justice, procedures prescribed under Criminal Procedure Code to be followed, law of evidence has to be strictly adhered to, accused to be represented by a lawyer<sup>32</sup> and an effective opportunity to the accused to defend himself. Accused persons have the right before a criminal court to be defended by a pleader of his choice.<sup>33</sup> In *Machander's case*,<sup>34</sup> the Supreme Court held, “while it is incumbent on the court to see that no guilty person escapes but the court also has to see that justice is not delayed and the accused persons are not indefinitely harassed”.
- 8. In cases of violation of the right of the accused for Speedier Justice, the charges and the conviction shall be quashed. This is not the only course available. The other courses are that the court may make appropriate orders such as:-
  - (a) The conclusion of the trial within a fixed time;
  - (b) Where such conclusion of trial does not take place within the time fixed, the court may pass such orders as it may deem fit and just, depending upon the matter and circumstances of the case;
  - (c) Any time-limit fixed shall be qualified such as
    - (i) It cannot be done to merely shift the burden of proving justification on the shoulders of the prosecution;

<sup>31</sup> *Best Bakery Case*, Supra.

<sup>32</sup> Art. 38A of the Directive Principles makes it obligatory for the State to provide free legal aid by suitable legislation or schemes to ensure that opportunities for social justice are not denied to any citizen by reason of economic or other disabilities.

<sup>33</sup> See for details Sec 303 Criminal Procedure Code.

<sup>34</sup> *Machander v. State of Hyderabad*, AIR 1955 SC P.702.

- (ii) In every case, a complaint of denial of the right to speedy trial, it is primarily for the prosecution to justify and explain the delay; and at the same time it is also the duty of the court to weigh all the circumstances of a given case before imposing upon the complaint;
  - (iii) Fixing an outer-limit will not effectuate the guarantee of right to speedy trial. Even in USA, the Supreme Court has reportedly refused to fix any outer-limit in spite of the Sixth Amendment of the US Constitution<sup>35</sup> and.....the courts, while dispensing justice shall keep in mind not only the liberty of the accused but also the interest of the victims and their dear and near and above all the collective interest of the community and the safety of the nation so that public may not lose faith in the system of judicial administration and indulge in private retribution<sup>36</sup>
9. Right to speedier justice is available at all stages of trial namely:-
- (i) Investigation;
  - (ii) Inquiry;
  - (iii) Appeal;
  - (iv) Revision; and
  - (v) Retrial

The lawyers have a crucial role to play in invoking the appropriate jurisdiction of the High Courts to secure these rights to their clients, who are ultimate consumers of criminal justice system. These rights of the accused for speedier justice at all stages have to be considered in the light of the nature and gravity of crime, persons involved, social impact and societal needs and weighed along with the right of the accused to speedy trial. If the balance tilts in favour of the accused, the prosecution must be brought to an end or if it is in favour of prosecution, the trial should not operate against continuation of prosecution.

---

<sup>35</sup> *Mohd Hussain*, Supra, Para 24 Page 4543.

<sup>36</sup> *Kartar Singh v. State of Punjab*, 1994 Cr L.J. SC P.3139.



10. In conclusion, the following suggestions are made:-
- (i) The right to Speedier Justice recognised and has become a guarantee owing to series of judicial legislation has to be raised to a Constitutional guarantee by amending the Constitution to provide a new proviso numbered as 21(a) in the following terms:- *In criminal trial, every accused person shall have the right to speedy and fair trial.*
  - (ii) Lawyers shall consider as their prime-duty to take up the cases under 'free legal aid' scheme so that cases of the accused shall not go unrepresented. Free legal aid should not a mere Constitutional Directive Principle but should be transformed into a Fundamental right. A new proviso 21(b) shall be incorporated through the Amendment. It may be in the following terms:- *In cases, where an accused person is entitled to free legal aid, according to rules and procedure established by law, he shall have the right to legal aid.*
  - (iii) Lawyers, as members of the Bar and Officers of Court of law shall be committed to the cause of truth and justice and shall assist the court in the determination of truth;
  - (iv) Lawyers shall be committed to an ethical code of conduct that they shall not be a party to any act, directly or indirectly, which is likely to cause delay in the disposal of a case;
  - (v) The Bar and the Bench shall consider themselves as members of a family and co-operate for achieving the objective of Speedier Justice;
  - (vi) Though time-limit for the disposal of a case cannot be fixed, the court may order that the proceedings shall be commenced without delay and shall be disposed of as expeditiously as possible;
  - (vii) A watchful and diligent judge can prove to be a better protector of the right to Speedier Justice than any rule or guidelines;
  - (viii) Lawyers shall invoke the provisions of Sec 309, Sec 311 and Sec 258 of the Criminal Procedure Code for effectuating the right to Speedier Justice;

### Role of Lawyers for Speedier Criminal Justice System

---

- (ix) Right to speedy trial is available at all stages such as investigation, inquiry, appeal, revision including retrial;
- (x) Lawyers shall invoke the inherent jurisdiction under Sec 482 of the Criminal Procedure Code and writ jurisdiction of the High Courts under Art 226 to secure to accused person the right to speedier trial at all stages through reliefs, directives or orders;
- (xi) Any error, irregularity, omission or illegality occurring at any stage of the proceeding, the lawyers shall consider it as their duty to assist the court in rectifying such things, so that the ultimate decision in a trial is not affected. In other words, lawyers shall take early steps at appropriate timings to correct such things by bringing to the notice of the court, so that decision rendered become effective and no delay occurs, when the case is brought to the notice of higher judiciary; (Sec 461, 462 and 465(1) of the Code of Criminal Procedure) ;
- (xii) All fair trial principles be adhered to strictly so that the right to Speedier Justice is not delayed on account of violation of such principles Lawyers should consider themselves as primarily interested in observing the principles of fair trial so that their commitment to Speedier Justice remains unaffected and made easily realisable;
- (xiii) Retrials shall be conducted according to the principles laid down in Best Bakery case.
- (xiv) In all hard cases, lawyers should insist on day to day hearing so that the complicated, technical and complex cases are decided expeditiously;
- (xv) In cases of delay in getting sanctions, the courts must have power to direct that the sanctions be accorded within two weeks or so. In the event of sanction not being accorded within the time-specified, the law should be amended so as to proceed with the case without the requisite sanction. In other-words, failure to give sanction, as per the direction of the court shall be deemed as 'sanction' by such failure, so that the cases are not delayed for want of sanctions;
- (xvi) If reasonable cause is not shown by the prosecuting agency within a reasonable period or their refusal to show cause, the court must exercise the power to quash the proceedings;



- (xvii) Depending on the experience of the Bar and the Bench, various causes of delay noticed, shall be listed and suitable procedural changes be made to prevent such causes occurring in future;
- (xviii) Suitable number of courts be created and judge's strength be increased in each court, so that the delay in the disposal of cases is avoided;
- (xix) Whenever new laws are made and the courts are required to try cases under such laws, special courts be established to deal with such new cases under new laws so enacted (for example special courts to try economic offence etc.);
- (xx) Suitable and appropriate training be given to all concerned in the administration of justice to handle cases without delay;
- (xxi) Increasing recourse be had to forensic science methods, practices, procedures to try cases expeditiously;
- (xxii) Procedures and rules be so framed as to protect the innocent and punish the guilty;
- (xxiii) Speedier Trial and Justice be given to an accused persons, even if no request is made by them for such trial; and
- (xxiv) Pre-trial detention or remand should be as short as possible. In the event of a person detained for longer period during trial and declared innocent, the State should compensate for the loss sustained by such innocent person. The law may be suitably amended to provide for this.

□